FILED
JUL 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-761

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CYNTHIA A. FORRESTER,

Petitioner,

vs.

JUDGE HOWARD LEE WHITE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROMA JONES STEWART
Solicitor General, State of Illinois
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-3000
Attorneys for Respondent

ROSALYN B. KAPLAN *
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2130
Of Counsel

* Counsel of Record

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QUESTION PRESENTED

Whether the doctrine of judicial immunity shields a state-court judge from liability for damages in a Section 1983 action for alleged sex-based discrimination arising from the dismissal of a probation officer who performed duties which were an integral part of the judge's decision-making process?

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BRIEF FOR RESPONDENT

STATUTES INVOLVED

42 U.S.C. § 1983
Ill. Rev. Stat. ch. 37, ¶ 706-1 (1979)
Ill. Rev. Stat. ch. 37, ¶ 706-5 (1979)
Ill. Rev. Stat. ch. 38, ¶ 204-1 (1979)
Ill. Rev. Stat. ch. 38, ¶ 204-4 (1979)

The above statutory provisions are reproduced in the Appendix to this brief.

STATEMENT OF THE CASE

The respondent, Howard Lee White (sometimes referred to as the defendant), was, at all material times, a Circuit Judge of the Seventh Judicial Circuit of the State of Illinois, serving as Presiding Judge of the Circuit Court of Jersey County, Illinois (A-2).[1] In April 1977, Judge White hired the petitioner, Cynthia Forrester (sometimes referred to as the plaintiff), to serve as a juvenile and adult probation officer (*id.*). Throughout her employment, Judge White was Ms. Forrester's immediate supervisor (*id.*).

As an adult probation officer, plaintiff's duties included: preparation of presentencing reports in all felony cases; monitoring adult probationers; and filing recommendations for revocations as necessary (A-3 - A-4). As a juvenile probation officer, she received and investigated complaints; provided counseling or made referrals to social agencies; assisted the State's Attorney in filing juvenile court cases; and assisted in preparing those cases for hearing (A-5). She also made recommendations for dispositions and prepared presentencing reports for the judge (*id.*). When a disposition resulted in the placement of a juvenile under court supervision or on probation, she monitored the juvenile and recommended revocations as necessary (*id.*).

In July 1979, Judge White appointed Ms. Forrester to be supervisor of the Jersey County Juvenile Court Intake and Referral Services Project; in addition to her new duties with the Project, plaintiff continued to do juvenile probation work (A-5).

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[1] "A-" denotes a reference to the Appendix to the Petition for Writ of Certiorari.

Judge White discharged Ms. Forrester on October 1, 1980 (A-5). In July 1982, she filed an action in federal district court claiming that defendant had first demoted and then discharged her in violation of her right to be free from discrimination in employment on the basis of sex (A-38, A-6). Although she originally sought relief on Title VII grounds against Judge White and other defendants, and on Section 1983 grounds against the judge alone, plaintiff is now pursuing only her Section 1983 claim for damages.[2]

On April 13, 1984, the district court granted defendant's motion for summary judgment, ruling that Judge White was absolutely immune from liability for damages in this case (A-54). Plaintiff appealed to the United States Court of Appeals for the Seventh Circuit from that ruling and from the order granting defendant a new trial (see note 2). The Seventh Circuit ruled only on the immunity issue, assuming for that purpose that Judge White demoted and dismissed plaintiff on the basis of her sex (A-6). In a two-to-one decision, the court of appeals upheld the district court's decision on the immunity issue (A-1 - A-33).

---

[2] Plaintiff's Title VII claim against Judge White, the Seventh Judicial Circuit, and Jersey County was tried simultaneously with her § 1983 action (A-39). Following a jury verdict in plaintiff's favor on the § 1983 claim, and entry of judgment on the verdict, the Title VII claim was dismissed pursuant to the stipulation of all parties (*id.*). Judge White's motion for a new trial was granted on March 16, 1984 (A-48); on March 30, 1984, he filed a motion for summary judgment asserting the claim of judicial immunity which is the subject of this case as it comes before this Court (A-49).

SUMMARY OF ARGUMENT

The narrow question before this Court is whether a judge is entitled to absolute immunity for discharging an employee whose functions are an integral part of the judicial process. In this case, the employee was a probation officer whose information and advice to the judge directly implicated his discretionary judgment in sentencing, probation and revocation decisions. This personnel action merits the defense of judicial immunity to protect principled, independent decision-making.

The discharge of a probation officer is a "judicial act" within the scope of the "jurisdiction" of a circuit court judge, as those terms are to be analyzed and applied in evaluating a claim of absolute immunity. *Stump v. Sparkman*, 435 U.S. 349, *reh. denied*, 436 U.S. 951 (1978). "Jurisdiction," which must be construed broadly, *id.* at 356, describes the general authority of a judge to act; a court acts with jurisdiction not only when it enters an order in a controversy between litigants but in other circumstances, such as when it admits or disbars an attorney. *Bradley v. Fisher*, 13 Wall. (80 U.S.) 335, 354 (1872). By analogy, a judge who has inherent and statutory authority to hire or fire a probation officer acts within the scope of his jurisdiction when he performs such an action.

The two *Stump* criteria which identify a "judicial act" are satisfied in this case. In Illinois, the hiring or firing of a probation officer is a function normally performed by a judge. *Stump*, 435 U.S. at 362. Additionally, a probation officer deals with a judge in the latter's judicial capacity. *Id.* The working relationship between a judge and his probation officer must be distinguished from that

which exists between a judge and a janitor, for example. The latter situation is not unlike that of any private or governmental employer and employee. However, a probation officer's duties and entire employment relationship exist by virtue of that employee's interaction with the judge *qua* judge.

A judge should not be required to choose between risking a lawsuit for the discharge of his probation officer and protecting the quality of his sentencing decisions, which inevitably reflect the input of that employee. The Court should avoid the rote use of labels to denote whole categories of actions as administrative or ministerial, rather than judicial. As has been done by the *Forrester* Court and others which have allowed immunity defenses for certain employment decisions by judges, this Court should examine the personnel action with reference to the duties performed by the employee and the relationship of those duties to the judicial process. The necessary analysis resembles that performed by the circuit courts of appeals which have allowed the defense of legislative immunity in analogous situations. *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923, *reh. denied*, 793 F.2d 380 (D.C. Cir.), *cert. denied*, ____ U.S. ____, 107 S. Ct. 601 (1986); *Agromayor v. Colberg*, 738 F.2d 55 (1st Cir.), *cert. denied*, 469 U.S. 1037 (1984).

ARGUMENT

I.

THE COURT OF APPEALS RULED ON THE BASIS OF A PARTICULAR EMPLOYMENT RELATIONSHIP AND ITS IMPLICATIONS FOR THE JUDICIAL DECISION-MAKING PROCESS.

The court of appeals held that Judge White's decisions to demote and dismiss the plaintiff were judicial acts performed within the scope of his authority (A-22). *Forrester v. White*, 792 F.2d 647, 658 (7th Cir. 1986), *cert. granted*, ___ U.S. ___, 107 S. Ct. 1282 (1987). Accordingly, it ruled, "under the facts of this case," that the judge was entitled to absolute immunity from liability for damages in Ms. Forrester's civil rights action, in which she had alleged that her demotion and termination were the result of discrimination against her on the basis of her sex. *Id.* The court stressed that it had decided the case by addressing only the circumstances of this particular employment relationship. *Id.*

The question which plaintiff has presented to this Court for review asks whether a judge will be protected by judicial immunity "for demoting and discharging a court employee on account of her sex." Brief of Petitioner at i. The opinion of the court of appeals neither raised nor decided so broad an issue. To the contrary, it cautioned against any application of the immunity defense on the basis of generalizations which fail to consider the specific attributes of an employment relationship in the context of the policies underlying a grant of judicial immunity. A fair reading of the opinion below reveals that plaintiff's question to this Court would indeed receive a negative answer from the Seventh Circuit in cases where the

duties of a given employee are not directly related to the exercise of judicial discretion.[3] In such situations, the employment relationship "would not implicate the judge's institutional role within the court system" (A-18). 792 F.2d at 656 n.9.

The analysis of this Court should similarly focus upon the nature of the duties of this probation officer in the Jersey County Circuit Court, as they were described by the court below. The carefully crafted opinion of the Seventh Circuit certainly lends itself to application in analogous employment situations which implicate similar concerns, to foster the goals of principled and independent decision-making which are at the heart of the doctrine of judicial immunity. The decision below should not, however, be construed or evaluated as a sweeping elimination of civil rights protections for every individual employed by a judicial or quasi-judicial body. Before turning to a discussion of judicial immunity and its application to an employment decision of a judge, a brief examination of the role of an Illinois probation officer is set forth, to highlight the nature of the working relationship within which the complained-of decisions were made in this case.

II.

AN ILLINOIS PROBATION OFFICER ACTS AS AN ESSENTIAL ASSISTANT TO THE JUDGE IN THE EXECUTION OF HIS JUDICIAL FUNCTIONS.

In *Witter v. Cook County Commissioners*, 256 Ill. 616, 100 N.E. 148 (1912), the Illinois Supreme Court voided a statutory provision, as violative of the state constitutional mandate of separation of powers, because the statute granted to certain county officials the power to ap-

[3] *See, e.g., McMillan v. Svetanoff*, 793 F.2d 149 (7th Cir.), *cert. denied*, ___ U.S. ___, 107 S. Ct. 574 (1986).

point probation officers for the juvenile courts. The court explained that "[t]he investigation to be made by the probation officer is the investigation of the court through that officer as his assistant, by whom he performs the judicial duties and exercises judicial power." 256 Ill. at 623, 100 N.E. at 150. It concluded that the judiciary inherently had the power to select and discharge such assistants because that power "is necessary to the independent exercise of judicial power. . . ." *Id.* at 624, 100 N.E. at 150.

This view of the relationship between judges and probation officers is still in force today. The relevant statutes in effect during Ms. Forrester's tenure, and as recently amended,[4] continue to acknowledge ultimate judicial control over the selection of individuals to serve in these sensitive posts.

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[4] In the Appendix to this brief, defendant has included the statutory provisions in effect at the time of plaintiff's discharge describing: the functions and duties of juvenile probation officers, Ill. Rev. Stat. ch. 37, ¶ 706-1 (1979); the appointment of juvenile probation officers, Ill. Rev. Stat. ch. 37, ¶ 706-5 (1979); the appointment of adult probation officers, Ill. Rev. Stat. ch. 38, ¶ 204-1 (1979); and the duties of adult probation officers. Ill. Rev. Stat. ch. 38, ¶ 204-4 (1979). State laws governing the appointment and duties of probation officers have recently undergone a number of substantive and technical revisions: Public Act 84-692, approved September 20, 1985, II Laws of Illinois, 84th Gen. Assembly, 1985 Session 4423; Public Act 84-823, approved September 22, 1985, II Laws of Illinois, 84th Gen. Assembly, 1985 Session 5069; Public Act 84-1308, approved August 25, 1986, 7 West's Illinois Legislative Service 1986 Laws, 84th Gen. Assembly, Regular Session 1, §§ 48-49, 53-54 (technical revisory act); Public Act 84-1395, approved September 18, 1986, 8 West's Illinois Legislative Service 1986 Laws, 84th Gen. Assembly, Regular Session 574, §§ 5, 7; Public Act 84-1438, approved December 22, 1986, 10 West's Illinois Legislative Service 1986 Laws, 84th Gen. Assembly, Regular Session 46, § 17 (technical revisory act). However, the Chief Judge of each circuit still retains the authority to appoint probation officers. *See* Ill. Rev. Stat. ch. 38, ¶ 204-7(2)(b) (1986 Supp.). *See also* Ill. Rev. Stat. ch. 37, ¶ 706-1 (1985) (as amended by P.A. 84-823, § 2, effective April 1, 1986).

The responsibilities of adult and juvenile probation officers in Illinois encompass confidential and discretionary duties on behalf of the courts. In observing the relationship of the litigants in this case and the duties of the respondent, the court of appeals noted that plaintiff, as an adult probation officer, prepared presentence reports for the judge, monitored all adult probationers, and filed any necessary recommendations for revocation of parole (A-2 - A-4). 792 F.2d at 648-49. In her capacity as a juvenile probation officer, she performed investigative and counseling duties; assisted in preparing filed cases for hearings; made recommendations for dispositions; prepared presentencing reports for the judge; monitored juveniles placed under court supervision; and recommended revocations as necessary (A-4 - A-5). 792 F.2d at 649-50.[5]

The Seventh Circuit observed that plaintiff provided the judge with crucial information and advice which directly implicated his discretionary judgment in sentencing, probation and revocation decisions (A-19). 792 F.2d at 657. Case law suggests that probation officers employed in other jurisdictions may be similarly situated. *See, e.g., Demoran v. Witt*, 781 F.2d 155, 157 (9th Cir. 1986) ("Probation officers preparing presentencing reports serve a

[5] In July 1979, when Judge White made plaintiff supervisor of the Jersey County Juvenile Court Intake and Referral Services Project, her duties were increased, but she continued to do juvenile probation work (A-5). 792 F.2d at 650. Plaintiff's suggestion to this Court that her advice-giving duties were "inconsequential" is simply an attempt to inject a new factual element beyond the scope of this case in its present posture (Brief of Petitioner at 18, n.11). Judge White's need to rely upon her for crucial information to execute his adjudicatory functions is not now subject to dispute, and it is plaintiff's input into the decision-making process, rather than any other duties which she also performed, which distinguishes her role as an employee and officer of the court.

function integral to the independent judicial process"); *Spaulding v. Nielsen*, 599 F.2d 728, 729 (5th Cir. 1979) (preparation of presentencing report is " 'intimately associated with the judicial phase of the criminal process' " (citation omitted)); *Crosby-Bey v. Jansson*, 586 F. Supp. 96, 99 (D.D.C. 1984) ("[a] probation officer preparing a presentence report serves as the court's eyes and ears. . . ."). *See also Tripati v. United States Immigration & Naturalization Services*, 784 F.2d 345 (10th Cir. 1986); *Abbott v. Thetford*, 529 F.2d 695, 705 (Gewin, J., dissenting), *dissent adopted as en banc opinion on rehearing*, 534 F.2d 1101 (5th Cir. 1976), *cert. denied*, 430 U.S. 954 (1977); *Burkes v. Callion*, 433 F.2d 318 (9th Cir. 1970), *cert. denied*, 403 U.S. 908 (1971).

A recent study demonstrated, on the basis of statistics available for the period 1973-82, that judicial caseloads have been increasing significantly in state courts, with criminal filings exceeding new civil matters and growing at approximately twice the rate of the creation of new trial judgeships. Marvell & Dempsey, *Growth in State Judgeships, 1970-1984: What Factors are Important?*, 68 Judicature 274, 280 (February-March 1985). These statistics emphasize the Seventh Circuit's observations regarding a modern judge's increasing need to rely on his staff for substantive input into the judicial process (A-14). *Forrester*, 792 F.2d at 654. No less than for legislators, it would be "literally impossible" for a judge to discharge all his duties without reliance on a staff member such as a probation officer. *Cf. Gravel v. United States*, 408 U.S. 606, 616, *reh. denied*, 409 U.S. 902 (1972).

As a judicial disposition regarding a juvenile or criminal defendant may often depend in great part upon the efforts of a probation officer, a judge must be able to trust this employee and rely upon his or her skill, discretion

and integrity. Judicial control of this working relationship is, therefore, an integral part of the process of independent decision-making. Judge White's claim of immunity in this action must be examined in this particular context.

III.

A JUDGE IS ENTITLED TO ABSOLUTE IMMUNITY FROM LIABILITY FOR DAMAGES SOUGHT ON THE BASIS OF A JUDICIAL ACT TAKEN WITHIN THE SCOPE OF HIS JURISDICTION.

It is settled that a state court judge is entitled to immunity from liability for damages so long as the action complained of was taken within the general scope of his jurisdiction, even if "in excess of" the jurisdictional grant, and was the exercise of a judicial function. *Bradley v. Fisher*, 13 Wall. (80 U.S.) 335 (1872). Absolute immunity obtains regardless of the motives underlying the performance of a particular act, *id.*, protecting the innocent and guilty alike, because:

> it is impossible to know whether the claim is well founded until the case has been tried, and . . . to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.

Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). The purpose of this immunity, of course, is not to shield a corrupt judge, but to insure to the public the benefits of a principled, independent judiciary, free to engage in judicial tasks without fear of intimidation. *Pierson v. Ray*, 386 U.S. 547, 554 (1967), *citing Scott v. Stansfield*, L.R. 3 Ex. 220, 223 (1868). Without such immunity, judges would become "slaves in

every court that holds plea, to every sheriff, juror, attorney and plaintiff." *Randall v. Brigham*, 7 Wall. (74 U.S.) 523, 537 (1869), *citing Taaffe v. Downes*, note, 3 Moore P.C. Rep. 41.

Because of the overriding public policies served by absolute judicial immunity, this Court has repeatedly acknowledged the need for its forthright application, even when a genuinely wronged individual may find himself without any other means of civil redress. *Nixon v. Fitzgerald*, 457 U.S. 731, 754 n.37 (1982); *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976).[6] "[I]t has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Gregoire*, 177 F.2d at 581, *cited with approval in Briscoe v. LaHue*, 460 U.S. 325, 345 (1983). Although a product of the common law, immunity for "acts within the judicial role" survived congressional enactment of Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, now codified as 42 U.S.C. § 1983. *Pierson*, 386 U.S. at 554-55. *Cf. Tenney v. Brandhove*, 341 U.S. 367, *reh. denied*, 342 U.S. 843 (1951) (Section 1983

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[6] While the presence of a right of appeal may be helpful in identifying a particular act as protected by judicial immunity, the absence of such a right is not determinative of this issue. Certainly, the minor child in *Stump v. Sparkman*, 435 U.S. 349, *reh. denied*, 436 U.S. 951 (1978) (see discussion at 14, *infra*), who was never made a party to the proceeding, had no right to appeal from the judicial authorization of her sterilization. In fact, the only discussion of a right to appeal in the *Stump* majority opinion occurs in a footnoted response to the dissent's raising of this objection, 435 U.S. at 363 n.12; the Court simply pointed out that the absence of a right of appeal when a search warrant is issued, for example, does not destroy a judge's immunity for that act. And, as the Seventh Circuit aptly noted, the act of a judge sitting in a court of last resort would be no less judicial because of the absence of further review (A-12). *Forrester*, 792 F.2d at 653, *citing Moore v. Burger*, 655 F.2d 1265 (D.C. Cir. 1981).

does not abrogate common law immunity applicable to acts of state legislators).

The only question before this Court, therefore, is whether Judge White performed a judicial act generally within his jurisdiction in demoting and firing his probation officer. An affirmative answer to this question entitles him to an absolute immunity defense, even if there is no other recourse for a wrongfully discharged probation officer and despite the provisions of federal civil rights laws.[7] As the foregoing discussion has demonstrated, the need to immunize judges for all of their judicial acts is well recognized. *See Butz v. Economou*, 438 U.S. 478, 508-09, 511-12 (1978).

While this Court has never considered the applicability of judicial immunity to a judge's employment decision, Judge White will show that his challenged actions fairly meet the accepted criteria by which entitlement to this absolute defense is determined, and that a grant of immunity will similarly satisfy underlying policy considerations. The Seventh Circuit did not extend the concept of judicial immunity "further than its justification would warrant," *Harlow v. Fitzgerald*, 457 U.S. 800, 811 (1982), but properly applied that immunity in order to effectuate its intended purposes. Allowance of the immunity defense

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[7] The fact that a plaintiff is precluded from maintaining an action for damages does not mean that a judge will be able to flout federal law with abandon. Judicial immunity would not bar his punishment under the criminal law for a willful deprivation of civil rights, *O'Shea v. Littleton*, 414 U.S. 488 (1974). Moreover, a judge's violation of federal law in the manner alleged in the present case could lead to disciplinary proceedings against him by the Illinois Courts Commission. *See* Ill. Rev. Stat. ch. 110A, ¶¶ 61, 62, 63, 71 (1986 Supp.). This Court has recognized that, despite immunity from § 1983 damage actions, official misconduct will not be undeterred or go unpunished. *Briscoe v. LaHue*, 460 U.S. 325, 345 n.32 (1983); *Imbler v. Pachtman*, 424 U.S. 409, 428-29 (1976).

under the circumstances of this case promotes the same goals acknowledged in prior cases, preserving the integrity of the judicial decision-making process by protecting a judge's independent decisions as to the employment of persons whose duties are intimately connected with that process.

A. Judge White Acted Within The Scope Of His Jurisdiction In Demoting And Firing Ms. Forrester.

The question whether a judge acted generally within his jurisdiction, for purposes of the judicial immunity defense, must be decided on the basis of a broad construction of the scope of that jurisdiction. *Stump v. Sparkman*, 435 U.S. 349, 356, *reh. denied*, 436 U.S. 951 (1978). A judge is entitled to this immunity even for judicial acts in excess of his jurisdiction; liability may be incurred only "[w]here there is clearly no jurisdiction over the subject matter," *Bradley v. Fisher*, 13 Wall. (80 U.S.) 335, 351-52 (1872), so that an attempted exercise of judicial power is but an inexcusable usurpation of authority. *Id.* at 352.

"Jurisdiction," for immunity purposes, is not just a technical reference to the subject-matter jurisdiction which enables a judge to hear and decide a case. A finding as to jurisdiction does not turn on whether the conduct in question occurred in an adversarial or even a particularly formal setting. Thus, in *Stump*, the judge was entitled to absolute immunity for signing a sterilization petition presented to him *ex parte*, although the petition was not filed or docketed in court; was not the subject of notice to the minor or any hearing; was not made in conformity with any discernible statutory authority; and afforded no opportunity for appointment of a guardian *ad litem* for the girl or any eventual appeal on her behalf.

This Court has recognized that a court acts with jurisdiction when it admits or disbars an attorney, *Bradley v. Fisher*, 13 Wall. (80 U.S.) 335, 354 (1872); *Randall v. Brigham*, 7 Wall. (74 U.S.) 523, 539-41 (1869), and when it exercises its authority to punish a perceived contempt by a non-litigant occurring outside the courtroom. *McAlester v. Brown*, 469 F.2d 1280 (5th Cir. 1972), *cited with approval in Stump*, 435 U.S. at 361. The Seventh Circuit accurately concluded that the jurisdictional aspect of an immunity claim is a test of the judge's general authority to engage in the conduct for which the immunity is being sought; to be entitled to an immunity defense, "the official's act must have been within the scope of his powers." *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). Judge Learned Hand explained in that case that:

> What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him.

Id.

As previously discussed, the authority to appoint and remove such officers of the court as may be required to assist a judge in the performance of judicial duties, specifically including probation officers, has long been recognized in Illinois as an essential attribute of judicial power. *Witter v. County of Cook*, 256 Ill. 616, 624, 100 N.E. 148, 150 (1912). *Cf. State ex rel. Hovey v. Noble*, 118 Ind. 350, 21 N.E. 244 (1889); *In re Cooper*, 22 N.Y. 67 (1860). Consistently with the *Witter* holding, the Illinois statutes in effect at the time of plaintiff's termination provided that juvenile probation officers served at the pleasure of the chief judge, Ill. Rev. Stat. ch. 37, ¶ 706-5 (1979),

and that adult probation officers were "removable in the discretion [of the court appointing them] by an order duly entered of record." Ill. Rev. Stat. ch. 38, ¶ 204-1 (1979). This authority is analogous to that exercised by the Superior Court of Massachusetts in *Randall*, *supra*; an Illinois judge has jurisdiction to discharge a probation officer just as the Massachusetts statute established the jurisdiction of the court in *Randall* to remove an attorney from its bar.

In his capacity as the presiding judge of Jersey County, Judge White acted under the authority vested in him by the state constitution and the above statutory provisions when he demoted and fired his probation officer. It should, therefore, be concluded that his actions were not taken in the clear absence of jurisdiction, and that his assertion of judicial immunity was correctly held to survive plaintiff's challenge on this basis.

B. Judge White Performed Judicial Acts When He Demoted And Fired His Probation Officer.

In *Stump v. Sparkman*, 435 U.S. 349, 360, *reh. denied*, 436 U.S. 951 (1978), this Court recognized its first occasion to examine the "necessary attributes" of a judicial act in the context of a claim of judicial immunity. Rejecting positions that the characterization of an act as "judicial" depended upon the formality of the proceedings, *id.* at 360, or the presence of two contending litigants, *id.* at 363 n.12, the Court enumerated two broad factors which might be used to identify a particular act as a judicial one: "the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and . . . the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." *Id.* at 362. The statement of these criteria was not intended to narrow the

scope of the immunity defense but to ensure its application in situations where a claim of immunity arises outside the most traditional litigation setting; the *Stump* Court emphasized that a judge need not be acting within the context of a "case" for his actions to merit this protection. *Id.* at 363 n.12. This Court subsequently reiterated its conclusion that "judicial privilege applies even to acts occurring outside 'the normal attributes of a judicial proceeding.' " *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982), *citing Stump*, 435 U.S. at 363 & n.12.[8]

1) The Nature Of The Act: Firing A Probation Officer Is A Function Normally Performed By A Judge.

When an order is entered against a party during the course of ongoing litigation, the nature of the act is easily identified as "judicial."[9] However, other activities plainly qualify for this characterization as well, when they flow from the inherent power of the judiciary or constitute an auxiliary but essential part of the judicial process.

For example, the earliest cases of this Court to address claims of judicial immunity held that the admission and removal of attorneys were judicial acts. *Randall v.*

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[8] Contrary to plaintiff's implication (Brief of Petitioner at 13-14), this Court's decision in *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980), did not limit the *Stump* test or even present any detailed analysis of the attributes of a judicial act. It rather adopted the observation of the dissenting district court judge that the Virginia Supreme Court had acted in a legislative capacity, not a judicial one, in promulgating disciplinary rules to govern members of the bar. *Id.* at 731. In view of that conclusion, of course, the second part of the *Stump* test could not be satisfied.

[9] Conversely, certain acts taken by a judge are fairly easily identified as non-judicial. *See, e.g., Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974) (physical assault by a judge is not a judicial act).

Brigham, 7 Wall. (74 U.S.) 523 (1869); *Bradley v. Fisher*, 13 Wall. (80 U.S.) 335 (1872).[10] It has also been recognized that a judicial act is not confined to conduct occurring in a courtroom, *Lopez v. Vanderwater*, 620 F.2d 1229, 1234 & n.6 (7th Cir.), *cert. dismissed*, 449 U.S. 1028 (1980). The Seventh Circuit has held "docket management functions," such as delay in issuing a decision and interference with giving notice of a decision, to be judicial acts, *Lowe v. Letsinger*, 772 F.2d 308, 312 (7th Cir. 1985), and the Fifth Circuit has described as judicial functions the appointment and supervision of court reporters to ensure timely production of reports of proceedings. *Rheuark v. Shaw*, 628 F.2d 297 (5th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981); *Slavin v. Curry*, 574 F.2d 1256, *modified on other grounds*, 583 F.2d 779 (5th Cir. 1978). *See also Chocallo v. Bureau of Hearings & Appeals, SSA*, 548 F. Supp. 1349 (E.D. Pa. 1982), *aff'd*, 716 F.2d 889 (3d Cir.), *cert. denied*, 464 U.S. 983 (1983) (supervisory and case assignment functions of administrative law judges are judicial acts).[11] This Court has also extended immunity to prosecutors for their acts which are "intimately associated with the judicial phase of the criminal process," *Imbler v. Pachtman*, 424

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[10] *See also Ex parte Secombe*, 19 How. (60 U.S.) 9, 15 (1857), where, although no question of immunity was presented, this Court stated that summary removal of an attorney from the bar was an "exercise of judicial authority" within the jurisdiction of the court.

[11] Also, in *Martinez v. Winner*, 771 F.2d 424, *modified on other grounds*, 778 F.2d 554 (10th Cir. 1985), *vacated sub nom. Tyus v. Martinez*, ____ U.S. ____, 106 S. Ct. 1787 (1986), *vacated as moot*, 800 F.2d 230 (10th Cir. 1986), the court found a judge's assignment of cases, provisions for courtroom security, and communication with the news media to be judicial acts, explaining that an act might be described as administrative or ministerial for some purposes, while still qualifying as a judicial act under immunity law principles. 771 F.2d at 434. The court's reasoning in that opinion is instructive, even if its decision has no precedential value.

U.S. 409, 430 (1976); to witnesses, *Briscoe v. LaHue*, 460 U.S. 325 (1983); and to administrative law judges and agency employees performing prosecutorial tasks. *Butz v. Economou*, 438 U.S. 478 (1978).

The Seventh Circuit properly relied upon the role of a probation officer to conclude that a judge, whose judicial work product in sentencing matters is based to a significant degree upon the contributions of a probation officer acting on his behalf, performs judicial acts in controlling the quality of his own decisions by regulating the working relationship between himself and that member of his staff. As previously discussed, the duties of a probation officer, in Illinois and elsewhere, include tasks which are widely acknowledged to be an integral part of the work of the judiciary. In fact, on this basis several courts have held that probation officers themselves are entitled to absolute, quasi-judicial immunity, when their duties include direct input to the sentencing functions of a judge so as to be intimately related to the judicial process. *Tripati v. United States Immigration & Naturalization Services*, 784 F.2d 345 (10th Cir. 1986); *Demoran v. Witt*, 781 F.2d 155 (9th Cir. 1986); *Spaulding v. Nielsen*, 599 F.2d 728 (5th Cir. 1979). Because of the high degree of trust and confidence which must be placed in this type of court official, the employment of a probation officer in Illinois is normally performed by a judge. *Stump*, 435 U.S. at 362.

2) The Expectations Of The Parties: A Probation Officer Deals With A Judge In His Judicial Capacity.

The second element of the *Stump* "judicial act" test is also met, because a probation officer such as plaintiff deals with the judge in his judicial capacity. This Court is urged to recognize that no bright line can fairly be drawn be-

tween acts which are "judicial," "ministerial," or "administrative," for purposes of deciding whether a judge is entitled to absolute immunity for executing a particular duty.

The designation of an act as "ministerial," and hence not entitled to the protection of judicial immunity, stems from this Court's decision in *Ex parte Virginia*, 100 U.S. 339 (1880), which involved a criminal prosecution against a judge for his alleged violation of the Civil Rights Act of 1875 in selecting jurors. However, the Court assumed in that case that the act of selecting jurors was a ministerial one (see, *Pulliam v. Allen*, 466 U.S. 522, 541 n.21 (1984)), because it could be and often was performed by someone other than a judge, 100 U.S. at 348, but decided that the judge was not entitled to immunity whether the act was ministerial or judicial. *Id.*

In a strongly worded dissent to the *Ex parte Virginia* decision, Justice Field, the author of the Court's two prior opinions on judicial immunity, argued that the selection of jurors was indeed a judicial act. *Id.* at 359-60 (Field, J., dissenting). *See also* Biddle, *Liability of Officers Acting in a Judicial Capacity*, 15 American Law Review 427, 432, 435-36 (July 1881), where the author explained that the common law did not distinguish between a judge's ministerial and discretionary acts for purposes of judicial immunity and criticized the Court's decision in *Ex parte Virginia*. The decision in *Taaffe v. Downes*, set forth in note (a) of *Calder v. Halket*, 3 Moore, P.C. 28, 36 (1840), further demonstrated that, at common law, an act which might be ministerial if performed by someone other than a judge could nonetheless be protected by judicial immunity when performed by a judge. *Id.* at 44. As this Court's judicial immunity decisions have been informed by the common-law origins of the doctrine, *see, e.g., Pulliam v.*

Allen, 466 U.S. 522 (1984), it should recognize that blanket designations of types of acts as "ministerial" will not necessarily be useful in determining whether the actor should be protected by judicial immunity.

The rote use of labels such as "ministerial" or "administrative" to exclude certain functions from qualifying as judicial acts for immunity purposes can oversimplify the necessary analysis. The interrelationship of administrative and judicial functions was effectively addressed in a recent opinion by the Ninth Circuit, with particular reference to the decision now before this Court. In *Crooks v. Maynard*, No. 86-3629 (9th Cir. June 24, 1987), Judge Sneed observed that the distinction between "administrative" and "judicial" acts:

> ignores the reality of present day judging. . . . [D]irection of a court's staff in a manner designed to improve overall judicial performance frequently is as important as remaining on the bench longer hours, in-chambers conferencing with attorneys, or producing more and better opinions. If the purpose of absolute immunity is, as Judge Posner suggests in his dissent in Forrester, to protect judges "from being seriously deflected from the effective performance of their duties," *id.* at 660, it must be recognized that today's judge administers as he judges and that the sharp line that can be drawn between a judicial act, such as ruling on the admission of evidence, and managing court or chambers personnel, is useless in fixing the limits of judicial immunity.

Id., slip op. at 8-9.

Rather than draw such a "sharp line," the Seventh Circuit analyzed Judge White's decisions in terms of their particular relationship to the goal of fearless and independent judicial decision-making. Personnel decisions may perhaps be only "administrative" or "ministerial" to the

extent which a judge, in supervising a courthouse as a place of business, may be obliged to ensure that clerical and maintenance personnel are provided. The functions of those employees are not unique to the performance of judicial acts, and the relationship between a judge and a typist, or a judge and a janitor, is not unlike that of any private or governmental employer and employee. Such an employee may not deal with the judge "in his judicial capacity," within the meaning of *Stump*; the employee's performance does not constitute a judicial act; and the hiring and firing of such an individual could be performed by someone having no direct connection with the judge, without substantively altering the quality or manner of his decision-making. However, a probation officer's duties and entire employment relationship exist by virtue of that employee's service to the judge *qua* judge, *see Blackwell v. Cook*, 570 F. Supp. 474, 479 (N.D. Ind. 1983), and the ability to control the employment of the former will directly affect the quality of the latter's dispositions in criminal and juvenile cases.[12] Therefore, the discharge of a probation officer constitutes a judicial act according to the tests announced by this Court in *Stump*.

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[12] In *Doe v. County of Lake*, 399 F. Supp. 553 (N.D. Ind. 1975), the district court refused a claim of judicial immunity, based, in part, upon its determination of the ministerial or administrative nature of the responsibilities at issue. However, the court did not just apply these terms without analysis, but observed that evaluation of the activities complained of, and the implementation of any relief, would not "impair, interfere [with] or otherwise affect the discretion required by [the judges] in making case-by-case decisions on the merits of individual juvenile situations." *Id.* at 557-58.

C. Allowance Of Judicial Immunity With Respect To This Type Of Employment Decision Is Consistent With The Underlying Purpose Of This Defense.

The law realistically does not expect a judge to be oblivious to his own personal interests; the defense of judicial immunity recognizes the need to prevent judges from having to choose between risking themselves or abdicating their judicial responsibilities. *See, e.g., Bradley v. Fisher*, 13 Wall. (80 U.S.) 335 (1872). If a judge must weigh a decision to hire or fire a probation officer against his potential financial exposure in a lawsuit brought by every disappointed applicant or disgruntled former employee, he may become more inclined to accept inferior performance of duties which are an integral part of his sentencing functions.

Last year, while the federal courts experienced an overall decline in civil filings for the first time since 1977, the number of new civil rights employment suits increased by fourteen percent during the same period. 1986 Annual Report of the Director of the Administrative Office of the United States Courts 8-10. Judges throughout the country are presumably aware of this trend and may opt for self-protection, even at the expense of the quality of their performance of sentencing functions. This is precisely the sort of consequence that judicial immunity exists to prevent.

Furthermore, a judge might be understandably reluctant to see a jury or even another tribunal "second-guess" his discretionary sentencing judgments, in order to determine whether the quality of a probation officer's work was the genuine reason for the discharge of that employee. Disagreements as to the sufficiency of information upon which he has relied in his sentencing decisions may do incalculable harm to his reputation and may lead to at-

tempted collateral attacks on those sentences, as well as further actions against the judge by affected defendants.[13]

This Court has explained that it will not "draw functional lines finer than history and reason would support." *Nixon v. Fitzgerald*, 457 U.S. 731, 755 (1982). It should now decline to draw a line between strict "acts of adjudication" and other decisions of a judge which directly affect his adjudicatory functions. To focus only on the act of hiring or firing, as plaintiff asks this Court to do, without reference to the duties to be performed by the employee, the relationship of those duties to the adjudicatory process, or the reasons why a particular personnel decision rests with a particular official, is to disregard the ever-increasing need to delegate judicial functions, while ensuring that these delegated functions are performed in a manner consistent with the highest goals of independent decision-making. Judicial immunity is necessary to protect "the special nature of [judges'] responsibilities," *Butz v. Economou*, 438 U.S. 478, 511 (1978), and should not be denied because the decisions of Judge White were not the specific type which have previously been recognized as judicial acts in the rulings of this Court.[14]

As the Seventh Circuit noted, the courts have been divided in their rulings regarding immunity for employment-related decisions of judges. Lower courts which have granted immunity under circumstances similar to those of the case at bar, or acknowledged the possibility of such a grant, have generally based their conclusions

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[13] Plaintiff's belief that "a judge has nothing to fear" (Brief of Petitioner at 17) from the institution of such litigation overlooks this Court's decision in *Pulliam v. Allen*, 466 U.S. 522 (1984). *See*, Weisberger, *The Twilight of Judicial Independence—Pulliam v. Allen*, 19 Suffolk University Law Review 537 (Fall 1985).

[14] The decisions are, however, similar to those protected in *Randall v. Brigham*, 7 Wall. (74 U.S.) 523 (1869), and *Bradley v. Fisher*, 13 Wall. (80 U.S.) 335 (1872), as previously discussed.

on the need to protect the integrity of the decision-making process. *See, e.g., Forrester v. White*, 792 F.2d 647 (7th Cir. 1986); *cert. granted*, ____ U.S. ____, 107 S. Ct. 1282 (1987); *Laskowski v. Mears*, 600 F. Supp. 1568 (N.D. Ind. 1985); *Mason v. Twenty-Sixth Judicial District of Kansas*, No. 86-2103-S (D. Kan. April 8, 1987); *Pruitt v. Kimbrough*, 536 F. Supp. 764 (N.D. Ind. 1982), *aff'd*, 705 F.2d 462 (7th Cir. 1983); *Blackwell v. Cook*, 570 F. Supp. 474 (N.D. Ind. 1983). *See also, Cronovich v. Dunn*, 573 F. Supp. 1340 (E.D. Mich. 1983) (finding that the scope of judicial immunity for personnel decisions is unclear).

Certainly, the question is not an insubstantial one, *cf. Davis v. Passman*, 442 U.S. 228, 251 (1979) (Stewart, J., dissenting), yet those cases denying immunity for employment decisions often fail to consider the employees' participation in the judicial acts of their employer judges. For example, in *Shore v. Howard*, 414 F. Supp. 379 (N.D. Tex. 1976), plaintiffs, who had been employed as adult probation volunteer coordinators, responsible for recruiting, training and supervising volunteer probation officers, were fired by the director of the county adult probation office. Plaintiffs alleged that these discharges were in violation of their civil rights, relying in particular on the provisions of local civil service laws. The district court ruled, first, that judicial immunity would not protect the local judges (who were found to be necessary parties defendant) from an action for equitable relief, and then, quoting *Ex parte Virginia*, 100 U.S. 339, 348 (1880), summarily concluded that the rhetorical question posed in that case "clearly dispose[d] of the claim of judicial immunity in regard to the employment and dismissal of employees within the context of civil rights actions." 414 F. Supp. at 386.[15]

[15] The rhetorical question was whether the election or appointment of "court-criers, tipstaves, sheriffs, & c." was a judicial act. (See discussion *supra* at 20, regarding *Ex parte Virginia*).

Not only did the *Shore* Court fail to explain why the hiring of probation officers could be performed by private persons, as was said to be true for jurors in *Ex parte Virginia*, but it immediately retreated from the potential scope of its conclusion by noting that judicial officers might not always be liable in damages for the employment or dismissal of employees. 414 F. Supp. at 386 n.3.[16] After expressly declining to reach the question of a judge's liability for monetary relief under such circumstances, *id.*, the court went on to dismiss the plaintiffs' action on the merits, finding that they were not "employees" under the County Civil Service Act, and were not entitled to civil service protections, because judicial

[16] Other decisions have displayed only brief consideration of this issue. In *Marafino v. St. Louis County Circuit Court*, 537 F. Supp. 206 (E.D. Mo. 1982), *aff'd*, 707 F.2d 1005 (8th Cir. 1983), the court observed in a single sentence analysis, based upon the particular facts of that case, that the plaintiff did not deal with the judge in his judicial capacity and, therefore, one of the *Stump* factors could not be met. In *Goodwin v. Circuit Court*, 729 F.2d 541 (8th Cir. 1984), the individual judge initially raised a claim of good faith immunity. *Id.* at 545-46. A claim of judicial immunity in connection with the transfer of a hearing officer to the position of a staff attorney was summarily rejected with the conclusion that this transfer was an administrative personnel decision, citing only the *Marafino* decision in support of this conclusion. *Id.* at 549. In *Retail Clerks International Association v. Leonard*, 450 F. Supp. 663 (E.D. Pa. 1978), plaintiffs were employees of the register of wills, who was described as a judicial officer with judicial duties involving the probate of wills. The job descriptions of the plaintiff employees were never discussed in the court's decision, which summarily concluded that the hiring and firing of employees was not within the purview of the register's judicial duties. In *Clark v. Campbell*, 514 F. Supp. 1300, 1302 (W.D. Ark. 1981), a statute gave the county judge the "executive power" to hire county employees, and required him to be bonded in the exercise of this duty. On the basis of this statutory language, the district court concluded that the hiring and firing of county employees was not a judicial act; otherwise, the bond requirement would be meaningless. *Id.* at 1303.

"responsibility for the supervision of probationers includes these facets of employment and dismissal of probation officers." *Id.* at 396.

Two recent cases have rejected judicial immunity defenses with reference to the particular roles of the plaintiffs and their relationship with their former employers. In *McMillan v. Svetanoff*, 793 F.2d 149 (7th Cir.) *cert. denied*, ____ U.S. ____, 107 S. Ct. 574 (1986), decided five days after *Forrester*, the court of appeals denied a judge's claim of immunity in his former court reporter's action alleging that she had been discharged because of her race and political affiliations. The court did not reject either the holding or rationale of *Forrester*, but found that McMillan did not share the same working relationship with the judge as was apparent in the former case, and that the judge's decision-making ability was not implicated by his discharge of the court reporter. 793 F.2d at 152. Explaining that a judge should not be able to invoke the immunity defense when his complained-of acts "do not involve the judicial process so that fear exists that freedom of judicial decisionmaking may be stifled," *id.* at 154, the court found no connection between this personnel action and the decision-making process which would justify allowance of this defense. The *McMillan* decision provided the rationale for the Sixth Circuit's opinion in *Guercio v. Brody*, 814 F.2d 1115 (6th Cir. 1987), which refused a claim of immunity by a bankruptcy judge who had allegedly fired his personal secretary in violation of her First Amendment right of free speech.

These latter decisions are not inconsistent with the case at bar, but rather underscore its narrow scope. The *Forrester* Court only addressed a personnel action involving an employee whose direct participation in the decision-making process was a fundamental aspect of her employ-

ment relationship with her employer-judge; to implement the court's holding in other cases, it will be necessary to examine the nature of an employee's role in the judicial system. The required evaluation will surely not, however, be so burdensome as plaintiff suggests, because few categories of employees are likely to participate directly in the formulation of a judge's decisions. If the scope of the employee's duties is genuinely unclear, those duties may be ascertained through limited discovery as well as consultation of statutes or regulations controlling his or her job performance. As was true in the case at bar, the immunity issue can be resolved without engaging in a full trial of the merits of a plaintiff's claim.

The reasoning of the Seventh Circuit fosters the fundamental policies underlying the doctrine of judicial immunity and provides a fair, workable test which will give reasonable guidelines to judges, the legally sophisticated class of defendants affected by it. It should be adopted by this Court.

D. Employment Decisions Considered By The Courts In Connection With Other Immunities Provide Guidelines For The Resolution Of This Case.

This Court has often drawn analogies between the application of judicial immunity and application of other absolute immunities, such as those allowed for legislators acting in their legislative capacity and the President acting in his executive capacity. *See, e.g., Nixon v. Fitzgerald*, 457 U.S. 731, 751-52 (1982); *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967); *Barr v. Mateo*, 360 U.S. 564, 575 (1959). In addressing claims of immunity for employment decisions made by legislators, lower courts have performed analyses similar to that of the Seventh Circuit in the case at bar. The reasoning of these decisions is sound

and merits attention in resolving the analogous question presently before this Court.[17]

Debate over the nature and extent of a "legislative act" offers a number of parallels to the analysis which must be performed in cases of judicial immunity claims. As a general proposition, legislators are protected from liability when "acting in the sphere of legitimate legislative activity." *Tenney v. Brandhove*, 341 U.S. 367, 376, *reh. denied*, 342 U.S. 843 (1951). The purpose of this immunity is not for the personal benefit of a Member of Congress, but to protect the integrity of the legislative process. *United States v. Brewster*, 408 U.S. 501, 507 (1972). Legislative immunity applies to acts which are an "integral part" of the legislative process and protects a legislative aide to the extent that his actions would be immune if performed by the Member who employs him. *Gravel v. United States*, 408 U.S. 606, 621-22, 625, *reh. denied*, 409 U.S. 902 (1972).

In *Davis v. Passman*, 442 U.S. 228 (1979), this Court declined to decide whether that immunity protected Congressman Davis from a civil action for damages brought against him by a former staff member who alleged that her termination had been due to unlawful sex discrimina-

[17] Although it has not decided whether legislative or judicial immunity protects an actor for the hiring or firing of subordinates, this Court has extended the defense of absolute immunity to an employment decision made by the President of the United States. In *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), the former president was held absolutely immune from liability for damages in connection with the discharge of an air force employee, because the discharge was found to be within the outer perimeters of official executive duties. Of particular note is the *Nixon* Court's method of distinguishing the presidency from those governmental officials having only qualified immunity, by analogizing the duties of the chief federal executive to the "especially sensitive duties" of certain other public officials who are entitled to absolute immunity under well-settled law, such as judges and prosecutors. *Id.* at 746.

tion. *Id.* at 235 n.11.[18] The issue of legislative immunity for employment decisions was, however, subsequently addressed by the First and District of Columbia Circuit Courts.[19] In *Agromayor v. Colberg*, 738 F.2d 55 (1st Cir.), *cert. denied*, 469 U.S. 1037 (1984), the plaintiff's lawsuit alleged civil rights violations in the denial of his application for employment as a press officer for the Puerto Rico House of Representatives. Acknowledging the link between the performance of protected duties and the employment of people to perform those duties, the court held: "[t]o the extent that an employee's function is 'essential' to the legislative process, his qualifications, and, hence, his proper selection, should be correspondingly essential." 738 F.2d at 59. While cautioning that every employment relationship would not implicate legislative interests, it recognized that those employees whose duties were to deal with the legislative process were "of direct legislative importance," citing the *Gravel* Court's observation that:

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[18] Upon its initial consideration of this case, the Fifth Circuit had decided that the Speech or Debate Clause did not protect a Member of Congress from a discrimination suit brought by a discharged employee. *Davis v. Passman*, 544 F.2d 865, 880-81 (5th Cir. 1977). That decision was reversed on other grounds on rehearing en banc, with Judge Jones, in a concurring opinion, observing that "the hiring and firing of [a Congressman's] 'alter ego' is a legislative activity and a part of the exercise of the legislative power." 571 F.2d 793, 802 (Jones, J., concurring).

[19] A claim of legislative immunity from damages was also allowed in connection with an employment decision in *Eslinger v. Thomas*, 476 F.2d 225 (4th Cir. 1973). Other subsequent opinions allowing legislative immunity for personnel actions include *Birdsong v. Dirck*, 633 F. Supp. 54 (E.D. Mo. 1984), and *Bostick v. Rappleyea*, 629 F. Supp. 1328 (N.D.N.Y. 1985). *See also Hudson v. Burke*, 617 F. Supp. 1501 (N.D. Ill. 1985) (legislator is immune for decisions to hire or fire aides who have the opportunity for meaningful input into the legislative process).

> "[I]t is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos. . . ."

Id. at 60, *citing Gravel*, 408 U.S. at 616-17. Therefore, legislative immunity for employment decisions as to "alter egos" of state legislators was deemed appropriate.[20]

Two decisions of the District of Columbia Circuit followed the same analytical path, first to deny, and later to grant, a claim of legislative immunity in suits brought by former congressional employees. In *Walker v. Jones*, 733 F.2d 923 (D.C. Cir.), *cert. denied*, 469 U.S. 1036 (1984), the court rejected a contention that the Speech or Debate Clause provided a defense to a civil rights action brought by the discharged manager of the House of Representatives' restaurants, finding such a personnel action "too remote from the business of legislating" to merit such protection. 733 F.2d at 928. Two years later, in *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923, *reh. denied*, 793 F.2d 380 (D.C. Cir.), *cert. denied*, ____ U.S. ____, 107 S. Ct. 601 (1986), the court found that the Speech or Debate Clause did shield the defendant Members of Congress in connection with the discharge of the first black Official Reporter of the House, who alleged that her dismissal was the result of racial discrimination.

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[20] Although the Speech or Debate Clause provides a constitutional foundation for the immunity applicable to Members of Congress, similarly expansive protection has been applied, as a matter of common law, to state legislators. *See, e.g., Tenney v. Brandhove*, 341 U.S. 367, *reh. denied*, 342 U.S. 843 (1951).

Citing *Agromayor, supra*, the *Browning* Court explained that:

> Personnel decisions are an integral part of the legislative process to the same extent that the affected employee's duties are an integral part of the legislative process. Thus, if the employee's duties are an integral part of the legislative process, such that they are directly assisting members of Congress in the "discharge of their functions," personnel decisions affecting them are correspondingly legislative and shielded from judicial scrutiny.

789 F.2d at 928-29 (citation omitted). Concluding that the plaintiff's duties as Official Reporter were directly related to the legislative process, the court held that the decision to terminate her employment was protected by legislative immunity.

The *Browning* Court explained that it would not extend this immunity to matters only remotely connected with the legislative process, although it concluded that immunity should not be restricted to situations in which the employee had discretionary duties with respect to legislative acts. In the case at bar, plaintiff did have discretionary input into Judge White's judicial functions, and, therefore, the judge's immunity claim need be analyzed only with respect to a more narrow range of employees. The *Agromayor*, *Walker* and *Browning* decisions nonetheless provide a useful discussion of functions which are "integral" to the legislative process and support, on that basis, the analogous evaluation of judicial functions which should be undertaken in this case.

CONCLUSION

The respondent, Judge Howard Lee White, respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Seventh Circuit finding that he is entitled to absolute immunity for alleged sex-based discrimination in connection with the discharge of petitioner, his former probation officer.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General, State of Illinois

ROMA JONES STEWART
Solicitor General, State of Illinois

100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-3000

Attorneys for Respondent

ROSALYN B. KAPLAN *
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2130

Of Counsel

* Counsel of Record

APPENDIX

STATUTES INVOLVED

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Ill. Rev. Stat. ch. 37, ¶ 706-1 (1979)

706-1. Probation departments—Functions and duties

§ 6-1. Probation departments—Functions and duties. (1) The chief judge of each circuit shall make provision for probation services for each county in his circuit.

(2) Every county or every group of counties constituting a probation district shall maintain a Probation Department, which shall be under the authority and supervision of the chief judge of the circuit or of some other judge designated by him. For the purposes of this Act such a Probation Department has, but is not limited to, the following powers and duties:

(a) To receive, investigate and evaluate complaints indicating delinquency, behavior otherwise requiring supervision, neglect or dependency, within the meaning of Sections 2-2 through 2-5;[1] to determine or assist the complainant in determining whether a petition should be filed under Section 4-1[2] or whether referral to an agency, association or other person or whether some other action is advisable;

and to see that the indicating filing, referral or other action is accomplished.

(b) When a petition is filed under Section 4-1, to make pre-hearing investigations and formulate recommendations to the court.

(c) To counsel and, by order of court, to supervise minors referred to the court; to conduct indicated programs of casework, including referrals for medical and mental health service, organized recreation and job placement for wards of the court and, when appropriate, for members of the family of a ward; to act as liaison officer between the court and agencies or associations to which minors are referred or through which they are placed; when so appointed, to serve as guardian of the person of a ward of the court; to provide probation supervision and protective supervision ordered by the court; and to provide like services to wards and probationers of courts in other counties or jurisdictions who have lawfully become local residents.

(d) To arrange for placements pursuant to court order.

(e) To assume administrative responsibility for such detention, shelter care and other institutions for minors as the court may operate.

(f) To maintain an adequate system of case records, statistical records, and financial records related to juvenile detention and shelter care and to make reports to the court and other authorized persons, and to other governmental bodies lawfully requiring them.

(g) To perform such other services as may be appropriate to effectuate the purposes of this Act or as may be directed by any order of court made under this Act.

(3) The Probation Department in any probation district or county having less than 1,000,000 inhabitants, or any personnel of the Department, may be required by the circuit court to render services to the court in other matters as well as proceedings under this Act.

(4) In any county or probation district, such a Probation Department may be established as a separate division of

a more inclusive department of court services, with any appropriate divisional designation. The organization of any such department of court services and the appointment of officers and other personnel must comply with Section 6-5.[3]

Amended by P.A. 81-469, § 2, eff. Jan. 1, 1980.

[1] Paragraphs 702-2 through 702-5 of this chapter.
[2] Paragraph 704-1 of this chapter.
[3] Paragraph 706-5 of this chapter.

Ill. Rev. Stat. ch. 37, ¶ 706-5 (1979)

706-5. Personnel of Probation and Court Services Departments

§ 6-5. Personnel of Probation and Court Services Departments. (1) The chief judge of the circuit shall appoint a Director of each Probation Department in the circuit and may appoint one or more assistant directors and probation officers, who, wherever possible, have had experience in the field of family or child welfare or special education in such field or fields, to serve at his pleasure or he may authorize the Director to appoint such assistant directors as well as probations [sic] officers and other personnel of the Department as the chief judge from time to time may determine are needed, to serve at the pleasure of the chief judge. The Director, who may also be the chief probation officer, shall have general charge of the Department under the supervision of the chief judge or of some other judge designated by the chief judge for that purpose.

(2) The chief judge of the circuit shall appoint a Director of any Court Services Department therein and may appoint one or more assistant directors, to serve at his pleasure, or he may authorize the Director to appoint such assistant directors as well as probation officers and other personnel of the Department as the chief judge from time to time may determine are needed, to serve at the pleasure of the chief judge. Appointments to any position in the Court Services Department must be made in accordance with standards prescribed by the chief judge in consultation

with an advisory committee on personnel of his selection, composed of persons of recognized and outstanding ability in the teaching or practice of social service and public welfare work or in the practice of psychiatry, psychology, internal medicine or pediatrics. The Director shall have general charge of the Department under the supervision of the chief judge or of some other judge designated by the chief judge for that purpose.

(3) The Supreme Court shall provide by order or rule that the Conference of Chief Circuit Judges convene to establish permissive state-wide minimum qualifications or criteria for directors and assistant directors of Probation or Court Services Departments and for probation officers and other social service personnel employed for purposes of this Act. After such minimum qualifications or criteria have been adopted by the Conference of Chief Circuit Judges and filed with the Supreme Court, appointments or reappointments of personnel may be made in accordance therewith by or by authority of the respective chief circuit judges. In addition, the Supreme Court may, in accordance with recommendations of the Conference of Chief Circuit Judges, provide for (a) consultative services, (b) assistance in the development of probation services, and (c) assistance in arranging programs of training and staff development for probation officers to Probation or Court Services Departments established under this Act.

Ill. Rev. Stat. ch. 38, ¶ 204-1 (1979)

204-1. Probation officers—Qualifications—Appointment, etc.

§ 9. The circuit court of each of the several counties in this State may appoint a probation officer to act as such for and throughout the county to which he shall be appointed. The circuit court of any county may appoint such number of additional probation officers for such county as the court may deem to be necessary or advisable. Any circuit court may also, in its discretion, appoint a chief probation officer, deputy chief probation officers, and supervisors, in addition to the number of probation officers

appointed. The Circuit Judges in any of the circuits in this State, except the judicial circuit of the County of Cook, may, in their discretion, in lieu of appointing a probation officer for each or any county in such circuit, appoint a probation officer to act for and throughout the circuit in which he may be appointed, or establish a probation district of 2 or more counties within the circuit, if such district would have a population of not less than 25,000 nor more than 100,000 inhabitants as determined by the school census preceding the establishment of such district, and appoint, immediately after such establishment, a probation officer and such number of additional probation officers for such circuit as the Circuit Judges may deem to be necessary or advisable, one of whom shall be the chief, to act for and throughout such district. Probation officers shall be of good character, shall possess such other qualifications as may be provided by rules to be adopted by such courts respectively, and may by such rules each be required to give bond in a sum not exceeding $5,000, conditioned for the faithful discharge of the duties of such probation officer, and otherwise as provided by the rules such bond to be with such sureties as may be approved by the court. The probation officers shall serve as such from the date of their appointment, shall be subject to the orders of the courts appointing them, and removable in the discretion thereof by an order duly entered of record. The circuit court may adopt general rules not inconsistent with the provisions of this Act, and promotive of its letter and spirit, providing, among other things for the qualifications of probation officers, their duties, and such other matters as may seem expedient.

The judges of the circuit court of any county shall meet as a unit body, at such times as they deem proper, and at any such meeting may appoint a chief probation officer to act as such over all the probation officers appointed by any of such courts. The judges may at any such meeting, adopt general rules not inconsistent with the provisions of this Act, but promotive of its letter and spirit and transact such other business concerning the subject matter of this Act as to such judges may seem proper.

The judges may, at any such meeting appoint a committee of such number of them as they may determine to exercise the ministerial powers of the entire body of judges and the powers of appointment and removal of the chief probation officer, such committee to report to the entire body of judges at such time as may be required by rules or by specific order.

Amended by P.A. 79-1138, § 1, eff. July 1, 1976.

Ill. Rev. Stat. ch. 38, ¶ 204-4 (1979)

204-4. Probation officers—Duties

§ 12. The duties of probation officers shall be:

(1) To investigate as required by section 3 of this act,[1] the case of any person to be placed on probation. Full opportunity shall be afforded a probation officer to confer with the person under investigation when such person is in custody.

(2) To notify the court of any previous conviction for crime or previous probation of any defendant invoking the provisions of this act.

(3) All reports and notifications required in this Act to be made by probation officers shall be in writing and shall be filed by the clerk in the respective cases.

(4) To preserve complete and accurate records of cases investigated, including a description of the person investigated, the action of the court with respect to his case and his probation, the subsequent history of such person, if he becomes a probationer, during the continuance of his probation, which records shall be open to inspection by any judge or by any probation officer pursuant to order of court, but shall not be a public record, and its contents shall not be divulged otherwise than as above provided, except upon order of court.

(5) To take charge of and watch over all persons placed on probation under such regulations and for such terms as may be prescribed by the court, and giving to each

probationer full instructions as to the terms of his release upon probation and requiring from him such periodical reports as shall keep the officer informed as to his conduct.

(6) To develop and operate programs of reasonable public service work for any persons placed on probation or supervision, providing, however, that no probation officer or any employee of a probation office acting in the course of his official duties shall be liable for any tortious acts of any person placed on probation or supervision as a condition of probation or supervision, except for wilful misconduct or gross negligence on the part of the probation officer or employee.

No person assigned to a public service employment program shall be considered an employee for any purpose, nor shall the county board be obligated to provide any compensation to such person.

(7) When any person on probation removes from the county where his offense was committed, it shall be the duty of the officer under whose care he was placed to report the facts to the probation officer in the county to which the probationer has removed; and it shall thereupon become the duty of such probation officer to take charge of and watch over said probationer the same as if the case originated in that county; and for that purpose he shall have the same power and authority over said probationer as if he had been originally placed in said officer's charge; and such officer shall be required to report in writing once a month the results of his supervision to the probation officer in whose charge the said probationer was originally placed by the court.

(8) To perform such other duties as are provided for in this act or by rules of court and such incidental duties as may be implied from those expressly required.

Amended by P.A. 80-710, § 2, eff. Oct. 1, 1977.

[1] Paragraph 786 (repealed) of this chapter.